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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Secretary of Interior exceeded his authority under § 402(a) of the Surface Mining Control and Reclamation Act of 1977, (SMCRA), 30 U.S.C. § 1232(a) (1982), which authorizes the imposition of reclamation fees on each "ton of coal produced," by interpreting "coal" to include, among other things, water that is not an inherent part of "coal."

2. Whether the Court of Appeals' conclusion that Congress had no specific intent with respect to the meaning of "coal" as that term is used in SMCRA, and its deference to the Department of Interior's expansive interpretation of that term, were correct in light of the readily discernable ordinary meaning of the word coal, and legislative history reinforcing a construction that accords with such ordinary meaning.

PARTIES TO THE PROCEEDINGS

Drummond Company, Inc., the petitioner herein, filed this action in the United States District Court for the District of Columbia. When the District Court issued its decision and an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, the National Coal Association and the Mining and Reclamation Council of America filed briefs *amicus curiae* in support of Drummond Company, Inc.'s appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Drummond Company, Inc.* respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 22, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in *Drummond Coal Company v. Hodel*, No. 85-5827 (D.C. Cir. July 22, 1986), is reported at 796 F.2d 503 (D.C. Cir. 1986). App. 1a-11a. The opinion of the District Court, which

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* Drummond Company, Inc., the successor to Drummond Coal Company, is a privately-owned corporation. All of its subsidiaries are wholly-owned.

was affirmed by the Court of Appeals, is reported at 610 F. Supp. 1489 (D.D.C. 1985). App. 12a-42a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1986. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on September 26, 1986, and this petition for certiorari is filed within 90 days of that date. App. 43a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are at issue in this case, and are set forth in the Appendix:

1. Surface Mining Reclamation and Control Act of 1977, §§ 401, 402, 30 U.S.C. §§ 1231, 1232 (1982), App. 117a-122a.

2. 42 Fed. Reg. 62715 (1977), 30 C.F.R. § 837.12, App. 129a-137a (initial reclamation fee regulations).

3. 30 C.F.R. § 700.5 (1986), App. 124a-128a (definitional provisions).

4. 30 C.F.R. § 870.12 (1986), App. 123a (current reclamation fee regulations).

STATEMENT OF THE CASE

1. Statutory Framework

One of the principal purposes of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) was to promote the reclamation of areas that were adversely affected by surface coal mining operations, while striking a "balance between protection of the environment . . . and the Nation's need for coal." 30 U.S.C. § 1202 (a), (f), (h). With that objective in mind, Congress established the Abandoned Mine Reclamation Fund (Fund)

to provide the financial base needed to reclaim and restore land and water resources in areas in which coal mining activities had ceased. 30 U.S.C. §§ 1231(c)(1), 1233. The Fund is subsidized primarily by means of reclamation fees levied upon coal mining operators throughout the United States. 30 U.S.C. § 1231(b)(1).

The amount of reclamation fees owed by each coal mining operator responsible for making payments to the Fund is determined by the weight of coal mined. With respect to surface coal mining, § 402 of the statute provides that the operator must contribute to the Fund on a quarterly basis "a reclamation fee of 35 cents per ton of coal produced. . . ." 30 U.S.C. § 1232(a).[1]

Congress arrived at this method for calculating reclamation fees after much deliberation over how to control the environmental consequences of coal mining without affecting adversely the ability of the coal industry to meet the nation's energy requirements. 30 U.S.C. §§ 1201, 1202. Congress was particularly concerned that the reclamation fee and other provisions of SMCRA not be implemented so as to impose an undue burden on the coal industry, or to cause inflation in the economy. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669. Congress' analysis of the costs associated with payment of reclamation fees by the coal industry was predicated on the assumption, not articulated in the text of the statute but nevertheless apparent from the House Report on the final bill,[2] that the substance to be taxed was in fact combustible coal and not extraneous materials found with it or absorbed by it during or after mining.

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[1] In contrast, the reclamation fee for coal produced by underground mining is 15 cents per ton, or 10 percent (10%) of the value of the coal at the time, whichever is less. 30 U.S.C. § 1232(a).

[2] *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, 149, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669, 681.

The issue here—whether such extraneous materials, specifically in this case water, should be included in the weight of coal for purposes of calculating reclamation fees under SMCRA—has arisen as a consequence of the practical realities of surface coal mining. When coal is removed from the ground, rock, clay, dirt, and other debris are frequently attached to or mixed with it. These impurities add weight to the total tonnage of mined material, but add nothing to the value of the commodity that the operator eventually sells. Such impurities can be removed from the coal only through expensive measures such as coal washing, which many small and midsize coal operators simply cannot afford.

Even after the coal and noncoal materials are extracted from the ground, their total weight may be increased by the weight of water absorbed by the coal when it is exposed to rain, or to water in the mine or pit, or to water during the washing process in a coal preparation plant. Coal operators distinguish this water, or "excess moisture", that may be added to coal after extraction from the inherent moisture content found in coal in its natural state.

2. Regulatory History

SMCRA vests the responsibility for administering the reclamation fee program in the Secretary of Interior (the Secretary). 30 U.S.C. § 1232(a). Acting through the Interior Department's Office of Surface Mining (OSM), the Secretary first promulgated regulations governing the collection of reclamation fees on December 13, 1977.[3] 30 C.F.R. Part 837, 42 Fed. Reg. 62713 (1977). The only provision of those regulations dealing with the issue of calculating reclamation fees under § 402(a) provided in pertinent part as follows:

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[3] These rules were incorporated without revision into permanent surface mining regulations issued by the Secretary on October 25, 1978. 30 C.F.R. § 870.12(b), 43 Fed. Reg. 49940 (1978).

> The [reclamation] fee shall be determined by the weight and value [of the coal] at the time of initial bona fide sale, transfer of ownership or use by the operator.

42 Fed. Reg. 62715 (1977), App. 132(a).

The Secretary's initial regulations did not prescribe any particular method for determining the weight and value of coal subject to payment of reclamation fees. The regulations did, however, set forth a definition of coal that has remained unchanged in the Secretary's current regulations:

> *Coal* means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above.

30 C.F.R. § 700.5 (1986), App. 124a (emphasis in original).[4]

Following promulgation of the Secretary's regulations, Drummond and other coal operators in Alabama did not include the weight of excess moisture in calculating the weight of coal subject to reclamation fees at the time of each initial sale.[5] They determined the weight of excess moisture by first identifying the moisture content of a sample of a particular coal shipment (*e.g.*, 6.9%); subtracting from that figure the percentage (2.88%) of the gross weight used by the State of Alabama as the

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[4] The American Society of Testing and Materials standard referred to in the above-quoted portion of the Secretary's regulations classifies coal by rank and sets forth test methods for classifying coals. By describing "moist" coal only as "inclusive of its natural complement of inherent or bed moisture," the standard plainly does not consider excess moisture as an element of "coal". Standard Specification for Classification of Coals by Rank, ASTM 388-77 at 2.

[5] Very rarely is all the coal delivered under a contract actually weighed. Rather, either the buyer or seller (or both) weigh a sample railcar or truckload of coal. The contract may call for a certain BTU (or heat equivalent) value per ton, and the price per ton often will vary depending on the BTU value.

standard inherent moisture content of coal located within that state; and deducting the resulting percentage (*e.g.*, 4.02%) from the gross weight of the mined coal, which constituted the excess moisture deduction.

Drummond and other Alabama coal operators reasoned that water added to coal after severance from the ground should not be counted as "coal" for purposes of the reclamation fees imposed by SMCRA.[6] This interpretation of the initial reclamation fee regulations was never disapproved by OSM.[7] In fact, it is clear from the record that prior to June 30, 1982, when the revised regulations at issue in this case were promulgated, the practice of the OSM regional officials responsible for implementing the Secretary's 1978 regulations was routinely to allow excess moisture deductions when a coal operator claimed them.[8]

On December 11, 1981, OSM proposed revisions to the abandoned mine land reclamation program, including changes to its § 402 fee regulations. 46 Fed. Reg. 60778

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[6] Drummond and other Alabama coal operators followed the same practice, which was authorized by state law, in determining their Alabama severance taxes.

[7] Although the record does not document the full extent of excess moisture deductions taken by coal operators outside of Alabama prior to 1982, coal operators throughout the country were certainly aware of the issue and it is reasonable to presume that a number of others took advantage of such deductions. Unless this practice had been brought specifically to the attention of OSM, however, as it was in the case of Drummond when it neglected to take the deduction for one reporting period and sought a refund, the Secretary would, in the absence of an audit of a coal company's § 402 fee reports, generally not have knowledge of such deductions.

[8] For example, an OSM memorandum indicated that excess moisture deductions "would not be questioned" in part because of the OSM regional official's "perception of an extremely slim possibility that the Government could prevail in a court effort to prove that water was in fact coal. . . ." App. 139a. Another OSM document referred to estimates "that approximately 70 percent of the tonnage reported by operators in the State [of Alabama] includes an adjustment for excess moisture." App. 144a.

(1981). The revised fee regulations, which were ultimately promulgated in final form on June 30, 1982, state in relevant part:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> . . . .
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

47 Fed. Reg. 28574 (1982), codified at 30 C.F.R. § 870.12 (b)(3)(i) (1986) (emphasis in original), App. 123a.

In the preamble to its 1981 proposed revisions, OSM explained that the intent of the change in its reclamation fee regulations was "to allow fees to be based on coal to be sold, and to prevent any deduction for impurities that have not been removed." 46 Fed. Reg. at 60781, col. 1 (1981). In promulgating his final regulations, the Secretary did not address the fundamental legal issue of whether he possessed the authority under SMCRA to treat excess moisture or other impurities as coal for purposes of the § 402(a) tax. Instead, he merely restated the assertions in the notice of proposed rulemaking that the revisions were intended as a clarification, and that excluding excess moisture would be "contrary to the established policy and the intent of the clarifying rule." 47 Fed. Reg. at 28578, col. 1 (1982).[9]

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[9] The only explanation for the new excess moisture policy offered by the Secretary was that without it (a) audits of operator records would become more complicated, (b) fee collections could be re-

3. The District Court Decision

On August 27, 1982, Drummond filed an action for declaratory and injunctive relief in the United States District Court for the Northern District of Alabama under 30 U.S.C. § 1276(a)(1) seeking to have the Secretary's June 30, 1982 revised regulations set aside. Because of uncertainty as to which court had jurisdiction, Drummond simultaneously filed an identical action as a protective measure under 30 U.S.C. § 1276(a)(1) in the United States District Court for the District of Columbia. Shortly after Drummond's complaints were filed, the Secretary filed a motion in the Northern District of Alabama to dismiss or transfer the Alabama case on the grounds that SMCRA provided for exclusive jurisdiction in the District of Columbia. After that motion was denied, Drummond requested and was granted a stay of the District of Columbia action pending the outcome of the Alabama suit.

On May 18, 1983, the United States District Court for the Northern District of Alabama ruled that it had jurisdiction and that the 1982 revised reclamation fee regulations were valid. *Drummond Coal Company v. Watt*, Civil No. CV82-H-1838-S (N.D. Ala., May 18, 1983), App. 44a-50a. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and vacated the Alabama district court decision on the ground that § 1276(a)(1) of SMCRA "vests in the United States District Court for the District of Columbia exclusive jurisdiction over th[e] case." *Drummond Coal Company v. Watt*, 735 F.2d 469, 470 (11th Cir. 1984), App. 51a-64a. With the Alabama litigation vacated, the district court below lifted its stay and on cross-motions for summary judg-

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duced, and (c) allowing operators to deduct moisture where a state permitted such deductions would "be inconsistent with requirements for uniform application of Part 870 and equitable treatment of all operators." *Id.* The Secretary made no attempt to explain why a rule allowing deductions of excess moisture could not have been uniformly applied to all operators.

ment ruled in favor of the Secretary. *Drummond Coal Company v. Hodel*, 610 F. Supp. 1489 (D.D.C. 1985), App. 12a-42a.

The district court viewed the remedial purposes of SMCRA as central to its analysis of the lawfulness of the revised regulations, and gave great deference to OSM in carrying out these purposes. Although the district court acknowledged Drummond's primary argument that SMCRA authorizes the assessment of fees only on coal, and that excess moisture is not coal, the court never directly addressed that issue because it believed that "the definition of 'coal' is irrelevant to the question at issue here." App. 36a. Instead, the court claimed that it only need decide whether the Secretary's decision to assess the reclamation fees based on weight at a given time was reasonable. At the same time, however, the court made clear its view that the reference to coal "produced" in § 402 precluded any meaningful effort to discern congressional intent underlying use of the term "coal." App. 25a-26a.

The court suggested that there were two alternative interpretations of the term "produced"—"produced" meaning "solely the process of extraction" and "produced" meaning "the entire process of extracting and selling coal, complete from pit to buyer's door." App. 25a-26a. The court determined that either approach would be consistent with the Act. App. 25a. And it concluded that the Secretary's choice of the latter interpretation was reasonable since it was "not inconsistent with the plain language of the statute." App. 28a.[10]

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[10] The district court also found that the revised regulations did not represent a policy change at the national level. App. 37a. Instead, it stated that lack of a consistent administrative practice argues for the conclusion that "OSM had no real policy" prior to 1982. To the extent that there was a change of policy, the court found that the Secretary acted reasonably. App. 41a.

4. The D.C. Circuit's Decision

The D.C. Circuit upheld the district court's interpretation of the language and legislative history of SMCRA. First, the court found the statutory term "coal produced" to be ambiguous. According to the court, that ambiguity was largely due to the fact that Congress did not define the terms "coal" or "coal produced" in the statute. App. 5a. In the court of appeal's view, further ambiguity was introduced by Congress' reference to coal "produced" because coal "production" could reasonably be interpreted to refer to the initial point of extraction before excess moisture became associated with coal, or to the point at which the coal was sold containing excess moisture. App. 5a-6a.[11] Without ever discussing the ordinary meaning of "coal" or "coal produced," the court of appeals claimed it was unable to come to any conclusions regarding the legislative intent underlying Congress' use of those words in § 402 of SMCRA. App. 5a-6a.

In view of what it found to be the ambiguity of the statutory language, the court stated that it was bound by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Secretary's interpretation, unless the legislative history specifically disclosed congressional intent on the question at issue. App. 6a. But the court concluded that "Congress in fact never addressed the particular issue that we confront in this case." App. 7a. The only guidance that the D.C. Circuit could extract from congressional deliberations on SMCRA was a general policy concern "with the burden placed on the [coal] industry and consumers and with the inflationary impact of the fee." App. 7a.

In reaching this conclusion, the court below expressly rejected the views of the Third Circuit in *United States*

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[11] At the same time, the court speculated, without any basis in the record for doing so, that the "prevailing industry practice" between 1977 and 1982 was to interpret the phrase "coal produced" to include extraneous materials such as excess moisture. App. 6a.

v. Brook Contracting Corp., 759 F.2d 320 (3rd Cir. 1985), a case in which the precise reclamation fee regulations at issue here were invalidated.

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue of national importance. As the *amici* briefs that will be submitted in support of this petition by the two major associations of coal companies attest,[12] whether "coal" includes excess moisture is an issue that has a profound effect on the financial obligations of every coal operator in the United States under the reclamation fee program of SMCRA. In fiscal year 1985 alone, the Secretary of Interior collected over $226 million in reclamation fees from coal operators throughout the country. Millions of dollars of these fees were paid by coal operators on noncoal materials such as excess moisture which, under the Secretary's revised regulations, cannot be deducted from the weight of coal unless they are physically removed from it. When one considers that the Secretary has collected over a billion dollars in reclamation fees over the last decade, it is apparent that the Secretary's prohibition against excluding excess moisture and other noncoal material from calculations of § 402(a) fees costs coal companies millions of dollars each year. The Secretary's statutory authority to impose such a prohibition is, therefore, an issue that has an enormous practical effect on the economic health and survival of the American coal industry.

Moreover, the question whether the term "coal" includes excess moisture has been a recurring one not only under the reclamation fee program, but also under the black lung tax program administered by the Internal

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[12] The National Coal Association and the Mining and Reclamation Council of America, together representing more than 400 coal companies, filed *amici* briefs in the court of appeals below, and will be filing *amici* briefs urging this Court to grant Drummond's petition.

Revenue Service and the United Mine Workers of America pension fund program into which many coal operators are required to make payments. In each of those contexts, the question whether "coal" should include excess moisture involves millions of dollars to the coal industry, and has repeatedly arisen in litigation. Any answer that the Court may give to that question in the context of § 402 of SMCRA would unquestionably have a dramatic impact on resolution of this issue in these other settings.

This case also presents an issue on which there is a clear and unequivocal split in the circuits. While the D.C. Circuit has upheld the Secretary's regulations, the Third Circuit, in *Brook Contracting*, held that they exceeded the scope of § 402(a) and were therefore invalid. In express contradiction to the Third Circuit's holding that § 402 does not authorize the Secretary to collect reclamation fees on the weight of "impurities", the D.C. Circuit ruled that the statute gave the Secretary the authority to tax "impurities", including excess moisture, as "coal." This split between two circuit courts on a fundamental question of statutory interpretation under SMCRA constitutes a compelling justification for granting this petition. Absent review by this Court, the extent of the Secretary's authority to collect reclamation fees will remain confused and unsettled. As it now stands, the Secretary's regulation cannot be uniformly enforced, and many coal operators, including Drummond, will be required to pay millions of dollars in reclamation fees that other operators, located in the Third Circuit and thus fortunate enough to claim the benefit of the *Brook Contracting* decision, will not have to pay. Against this background, resolution of the conflict between the circuit courts by this Court is essential to avoid disruption and inconsistent enforcement of the reclamation fee program, and to ensure the nationwide application of a single set of rules governing calculation of those fees.

Even in the absence of a conflict among the circuits, the decision below warrants review by this Court because it carries the statements of this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an unwarranted and dangerous extreme. In *Chevron*, this Court admonished the lower courts that when reviewing agency action they are to "give effect to the unambiguously expressed intent of Congress," and to defer to an agency's reasonable construction of the statute "if the statute is silent or ambiguous with respect to the specific issue. . . ." 467 U.S. at 843.

The court below, however, has gone far beyond these directives by holding that the intent of Congress with respect to the meaning of a key statutory term cannot be discerned unless Congress explicitly defines that term in the text of the statute or in its legislative history. In reaching this conclusion, the D.C. Circuit abdicated its responsibility to apply common sense to the question before it and thus failed to consider the ordinary meaning of a key statutory term. It also failed to consider whether the general purposes of Congress in enacting SMCRA support the Secretary's expansive and counter-intuitive interpretation of the term "coal". The lower court's approach, if uncorrected, would inevitably lead to the evisceration of meaningful judicial review and to blind deference to agency interpretations, no matter how unreasonable, predicated on the "absence" of congressional intent. Accordingly, this Court's review of the decision below is needed to make clear that *Chevron* was not intended to lead reviewing courts down that path.

I. THE MEANING OF "COAL" IS A RECURRENT ISSUE OF NATIONAL IMPORTANCE

The question whether the Secretary has the authority to tax excess moisture and other noncoal materials as "coal" under § 402 of SMCRA is of critical importance to the coal industry. Each year, coal operators throughout the United States collectively pay hundreds of mil-

lions of dollars in reclamation fees. For example, as noted above, the Secretary in 1985 collected over $226 million in such fees.[13] While the portion of the annual reclamation fee payments attributable to the weight of excess moisture and other noncoal materials for which the Secretary's regulations prohibit deductions is not known, there can be no doubt that the § 402 fees paid annually on such materials amount to millions of dollars. Particularly for small or midsize coal companies which cannot afford to remove all excess moisture or other noncoal materials before weighing their coal, the economic harm imposed by the Secretary's regulations is severe. Thus, while the Secretary may have dismissed his 1982 revisions to reclamation fee regulations as a mere "clarification," the financial consequences of those regulations have been and will continue to be extremely burdensome to the coal industry.

Whether the word "coal" means what its plain English definition would suggest is vitally important in other contexts as well. That term also appears in the section of the Internal Revenue Code dealing with black lung taxes. *See* I.R.C. § 4121(a), (d). And this section of the code has given rise to litigation over the question whether "coal" includes excess moisture for purposes of calculating black lung taxes.

In *A.J. Taft Coal Co., Inc. v. United States*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985), the Eleventh Circuit relied on the plain meaning of the term "coal" in § 4121 of the Internal Revenue Code, in holding that the term simply did not encompass excess moisture. App. 91a. In contrast, the D.C. Circuit in this case ignored the plain meaning of "coal", and made clear its disagreement with the interpretation of the term adopted by the *Taft* court. App. 5a. This disagreement illustrates the extent to

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[13] 1985 Annual Report of the Office of Surface Mining Reclamation and Enforcement, p. 18.

which the meaning of "coal" has been the focal point of litigation whenever Congress has used the term.

Finally, the question of whether excess moisture associated with coal should be included in determining the weight of the coal has also arisen in the context of royalties paid by coal operators to union pension funds. The National Bituminous Coal Wage Agreement between the United Mine Workers Union and signatory coal companies requires employer contributions to pension trust funds based, in part, on the tonnage of coal produced. Coal operators in various states have taken deductions for excess moisture and other noncoal materials, and many of these deductions have been contested in court actions by fund trustees.[14] Whether "coal" should be interpreted in accordance with its plain meaning has been a central issue in this pension fund litigation.

II. REVIEW BY THIS COURT IS NEEDED TO RESOLVE A SPLIT BETWEEN THE CIRCUITS ON A FUNDAMENTAL QUESTION CONCERNING THE SCOPE OF THE SECRETARY'S AUTHORITY UNDER SMCRA

The D.C. Circuit's decision in this case creates a sharp conflict between two circuit courts. The court below held that the Secretary acted within the bounds of his authority under SMCRA when he revised the reclamation fee regulations to prohibit deductions of excess moisture and other noncoal materials in determining the weight of coal subject to payment of such fees. The Third Circuit, in contrast, ruled in *Brook Contracting* that the Secre-

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[14] *Compare A.J. Taft Coal Co., Inc. v. Connors*, No. CV86-H-245-S, slip op. (N.D. Ala. June 18, 1986), App. 105a-116a, and *Combs v. Sun-Up Coal Company, Inc.*, Civil No. V-80-P-0236-J, slip op. (N.D. Ala. September 3, 1980) App. 96a-104a, which permitted mine operators to take excess moisture deductions, *with Huge v. Ondesko*, 415 F. Supp. 816 (W.D. Pa. 1976), and *Lewis v. Kerns*, 175 F. Supp. 115 (S.D. Ind. 1959), which reached the opposite result.

tary exceeded the proper limits of his statutory authority in promulgating revised reclamation fee regulations that purported to tax noncoal materials. As a result of this conflict, § 870.12(b)(3)(i) of the Secretary's revised regulations has been upheld by the D.C. Circuit, but cannot be enforced against coal operators in jurisdictions covered by the Third Circuit.

The extent of the conflict before this Court extends far beyond the fact that a key component of the Secretary's revised reclamation fees regulations is valid and enforceable in the D.C. Circuit and perhaps other circuit courts, while at the same time is invalid and unenforceable in the Third Circuit as well as any others that choose to follow it. In its analysis of congressional intent discernible from Congress' use of the term "coal" in § 402 of SMCRA, the D.C. Circuit decision in this case stands in stark contrast to the Third Circuit's interpretation of "coal" in *Brook Contracting*. The court below found the term "coal" to be ambiguous because Congress did not provide a definition of that term in the statute itself. App. 5a. It made no attempt, as commonly accepted canons of statutory construction would dictate,[15] to ascertain from the ordinary meaning of the term "coal", the congressional intent underlying its use in § 402.[16]

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[15] *See, e.g., Russello v. United States*, 464 U.S. 16, 21 (1983).

[16] Indeed, as noted above, the Secretary's own definition of coal excludes such extraneous substances. The ordinary meaning of "coal" is stated clearly in its dictionary definition: coal is "a black or brownish black solid combustible mineral substance formed by the partial decomposition of vegetable matter without free access of air and under the influence of moisture and in many cases increased pressure and temperature, the substance being widely used as a natural fuel and containing carbon, hydrogen, oxygen, nitrogen, and sulfur as well as inorganic constituents that are left behind as ash after burning." *Webster's Third New International Dictionary* 432 (1976 ed.). A common sense reading of this definition suggests that extraneous substances, such as excess moisture, which are associated with coal only after its extraction from the ground,

The Secretary's attempt to implement a far more expansive interpretation of "coal" for purposes of determining the weight of material subject to reclamation fees is even more untenable in light of his own definition of the term in § 700.5 of his regulations. In that section ,"coal" is defined as "combustible carbonaceous rock classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77. . . ." App. 124a. While the imposition of reclamation fees on the weight of noncoal material was clearly inconsistent with this definition, the Secretary made no attempt to explain the basis or justification for the discrepancy.[17]

The D.C. Circuit's failure to rely upon or even address the ordinary meaning of the term "coal" cannot be reconciled with the common sense approach to the task of interpreting that term adopted by the Third Circuit in *Brook Contracting*. While the Third Circuit found the legislative history of SMCRA to be dispositive, it expressed its basic agreement with the straightforward and yet compelling proposition that "coal is coal and it means a material that is combustible." App. 66a.[18]

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and which do not qualify as a "solid combustible mineral substance," should not be considered to be "coal" for purposes of calculating reclamation fees.

[17] The D.C. Circuit believed that this discrepancy was justified because the definition of "coal" in § 700.5 was preceded by the phrase "except where otherwise indicated". App. 10a, 124a. But nowhere in the reclamation fee regulations does the Secretary "otherwise indicate" that "coal" should be interpreted one way for purposes of the reclamation fee regulations generally, and another way in the case of § 870.12(b)(3)(i) specifically. Even more important is the fact that the Secretary lacked the statutory authority to define "coal" in terms that were inconsistent with the ordinary meaning intended by Congress and reflected in § 700.5.

[18] In a different but clearly analogous context, the court in the *Taft* case concluded that in the absence of an expressly stated congressional intention to the contrary, it would respect the "plain meaning" of the term "coal" and construe it not to include excess

In *Brook Contracting*, the Secretary's 1982 regulations were challenged in an action brought by the Secretary to collect reclamation fees from two coal companies. The companies had calculated their reclamation fees on the basis of the weight of combustible coal only. The government, seeking to apply the 1982 regulations, contended that the companies were liable for additional fees assessed on the weight of rock, clay, dirt, and other material that was unearthed with coal during the mining process. App. 67a.

The Third Circuit rejected the government's contention and the interpretation of SMCRA on which it was predicated. Unlike the D.C. Circuit, the Third Circuit found the legislative history of SMCRA to be a revealing source of congressional intent on the question of whether the weight of noncoal materials should be included in reclamation fee calculations. Specifically, the court's detailed examination of the legislative history led to the conclusion that "it counsels against an expansive interpretation of the term 'coal' and a broad-based imposition of the reclamation fee, as urged by the government." App. 73a.[19]

That conclusion was reinforced, in the Third Circuit's view, by the Secretary's own definition of the term "coal" as "combustible carbonaceous rock. . . ." App. 77a-78a. Recognizing that this definition was applicable "except

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moisture. App. 91a. The court found that it would be unreasonable to apply broadly the term "coal" to include water "which is not inherently a part of the mineral in its unmined state. . . ." App. 88a.

[19] The Third Circuit found that the "principal considerations" underlying passage of SMCRA compelled a narrow interpretation of § 402. App. 73a. In addition, the court carefully examined the cost projections on which Congress assessed the impact of the reclamation fee program on the coal industry and consumers, and concluded that "these projections strongly suggest that Congress intended to impose the fee on combustible coal only, and not, as urged by the government, on additional tonnage of rock, clay, and dirt." App. 74a.

where otherwise indicated," the Third Circuit found that while the Secretary's revised regulations suggested a different definition of the term "coal," those regulations exceeded the scope of the Secretary's authority under § 402 and were invalid to the extent that they purported to tax noncoal materials. App. 78a.[20]

In contrast to the Third Circuit, the D.C. Circuit completely ignored the ordinary meaning of "coal." But nothing in the language of § 402(a) or the legislative history of SMCRA reveals a congressional intent to allow the Secretary to depart from that ordinary meaning.[21] Indeed, as the Third Circuit's discussion of the legislative history of § 402 in *Brook Contracting* shows, there is every reason to believe that Congress intended the ordinary meaning of "coal" to control the implementation of the statute's commands.[22]

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[20] The D.C. Circuit also disagreed with the Eleventh Circuit's analysis of a similar statutory question in *A.J. Taft Coal Co. v. United States*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985). At issue in that case was the meaning of the term "coal" in the black lung tax provision of the Internal Revenue Code. The statutory question arose when a coal operator sought a refund of that portion of its black lung taxes that were levied on weight attributable to excess moisture. The coal company, which operated in Alabama, sought to reduce the tonnage subject to black lung taxes by the amount of moisture in excess of the 2.88% inherent moisture content common to Alabama coal. App. 89a-90a. Relying on the "plain meaning" of that term, the *Taft* court found that "coal" should not be construed to include excess moisture that was not part of the mineral in its unmixed state unless Congress expressed a clear intention to the contrary. App. 98a.

[21] The D.C. Circuit's concern about the additional ambiguity introduced by Congress' use of the word "produced" in conjunction with "coal" is unfounded. App. 5a-6a. Regardless of what point along the line from extraction to delivery constitutes coal "production," the focus of the analysis for reclamation fee purposes is "coal" itself and what it consists of.

[22] As the Third Circuit pointed out in *Brook Contracting*, any interpretation of the term "coal" that would give it other than its

The D.C. Circuit rejected the Third Circuit's analysis in its entirety: "Our review of the relevant legislative history leads us respectfully to disagree with the Third Circuit and agree with the district court below." App. 6a (footnote and citation omitted).

Finally, the practical consequences of allowing this conflict to persist justify this Court's review of the panel's decision. As it now stands, some coal companies, such as Drummond, will be governed by one interpretation of the statute, while other coal companies will be subject to a wholly different and conflicting interpretation.[23] This discrepancy in the implementation of what was intended by Congress and the Secretary to be a uniform statutory requirement is disruptive to the reclamation fee program, and is manifestly unfair to coal companies required to pay higher fees than their counterparts. Such a discrepancy, obviously unforeseen by Congress and contrary to its clear desire for a uniform national program, should not become a permanent part of

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ordinary meaning would be contrary to Congress' primary concern that reclamation fees not be implemented so as to impose a burden on the coal industry in particular and the national economy in general. App. 73a-74a. Furthermore, as the Third Circuit noted in *Brook Contracting*, an expansive interpretation of the term "coal" would be inconsistent with Congress' projections of the costs associated with the reclamation fee program. App. 74a-76a. The Third Circuit's analysis showed that these projections were based on Congress' assumption that a pound of coal would produce 10,000 BTU's of heat. App. 74a-75a. Such an assumption only made sense, the court found in *Brook Contracting*, if Congress envisioned each pound of coal as consisting of "combustible coal, and not some unspecified combination of coal and rock, clay, or dirt." App. 74a.

[23] As a result, coal companies undertaking mining operations in the Third Circuit will not be bound by the challenged portion of the Secretary's regulation, and will therefore be entitled to deduct the weight of rock, clay, dirt, and excess moisture in calculating reclamation fees. At the same time, Drummond and other coal companies subject to the Secretary's regulations cannot claim the benefit of those same deductions.

the regulatory landscape, and can be avoided by the granting of this petition.

III. THE D.C. CIRCUIT'S DECISION VIOLATED FUNDAMENTAL PRECEPTS OF STATUTORY CONSTRUCTION REAFFIRMED BY RECENT DECISIONS OF THIS COURT

The D.C. Circuit's misguided approach to statutory construction in its decision in this case further attests to the compelling need for review by this Court. The lower court's deliberate disregard of the ordinary meaning of language used by Congress and of the inferences that arise out of reasoned consideration of a statute's legislative history undermines Congress' reasonable expectation that reviewing courts will respect the means traditionally employed by the legislative branch to communicate its intent. In short, the D.C. Circuit's decision in this case means that even though Congress uses a well-understood term such as "coal" in a statute, the term may be defined to mean something entirely different at the whim of an administrative agency, and reviewing courts will not step in to require the agency to respect the ordinary meaning of Congress' language. This Court should not tolerate this step toward the dismantling of the ability of Congress to have confidence in the communicative power of its language.

Recent decisions of this Court have underscored the need for courts reviewing an agency interpretation of a statute to engage in a rigorous examination of its language and legislative history to discern congressional intent before invoking the deference doctrine. In *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143-143 (1984), for example, the Court warned that "deference is not to be a device that emasculates the significance of judicial review." And in *Chevron*, it reaffirmed the basic obligation of reviewing courts to "give effect to the

unambiguously expressed intent of Congress." 467 U.S. at 843.

While the D.C. Circuit in this case purported to follow the teaching of *Chevron*, its efforts to discern congressional intent were at best superficial and inadequate. In requiring courts to determine whether Congress evidenced its intent with respect to a particular issue, this Court in *Chevron* did not suggest that a reviewing court should ascribe dispositive significance, as the court below suggested, to Congress' failure to define the terms employed in a statute, App. 5a, or to disregard the ordinary meaning of the words used by Congress. As this Court has affirmed in prior cases, the ordinary meaning of statutory language is an invaluable source for discerning congressional intent.[24] Indeed, the D.C. Circuit itself in a recent case found *Chevron* to require consideration of the ordinary meaning of the words used by Congress in determining whether its intent is apparent.[25]

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[24] *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 686-687 (1986) (Federal Reserve Board's definition of "banks" under the Bank Holding Company Act of 1956 inconsistent with "accepted ordinary commercial usage" of other statutory phrases such as "demand deposit" and "commercial loan").

[25] *Transbrasil S.A. Linhas Aereas v. Dep't of Transportation*, 791 F.2d 202 (D.C. Cir. 1986).

CONCLUSION

For the reasons stated herein, this petition for certiorari should be granted.

Respectfully submitted,

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